FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HERB HALLMAN CHEVROLET, INC., a Nevada corporation; JOHN STANKO,
Plaintiffs-Appellants,

No. 97-15275

v.

D.C. No. CV-94-00333-DWH

DOROTHY NASH-HOLMES; DONALD COPPA; KARL HALL; FRANK LANDES; JOHN J. LONG; MICHAEL NEVILLE; WASHOE COUNTY,
Defendants-Appellees.

JERRY VAN DER HOEVEN; JAMES BAYUS; STAN BONDICK; CRAIG CONRAD; TOM GEORGE; RON HALL; JOHN JULIAN; JUDY LIMON; DAN MAHONEY; EDWARD MATTS; RON SHERK; GREG STEWARD; ALEX VARGO; CLIFFORD SOUZA,

No. 97-15323

Plaintiffs-Appellants,

D.C. No. CV-95-00090-DWH

v.

DONALD COPPA, individually and in his official capacity as Assistant District Attorney for Washoe County; DOROTHY NASH-HOLMES, individually and in her official capacity as District Attorney for

OPINION

Washoe County; FRANK D. LANDES, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney; JOHN LONG, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney; MICHAEL NEVILLE, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney; COUNTY OF WASHOE, a political subdivision of the State of Nevada,
Defendants-Appellees.

JERRY VAN DER HOEVEN; JAMES BAYUS; STAN BONDICK; CRAIG CONRAD; TOM GEORGE; RON HALL; JOHN JULIAN; JUDY LIMON; DAN MAHONEY; EDWARD MATTS; RON SHERK; GREG STEWARD; ALEX VARGO; CLIFFORD SOUZA,

No. 97-16960

Plaintiffs-Appellants,

D.C. No. CV-95-00090-DWH

v.

DONALD COPPA, individually and in his official capacity as Assistant District Attorney for Washoe County; DOROTHY NASH-HOLMES, individually and in her official capacity as District Attorney for Washoe County; FRANK D.

LANDES, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney; JOHN LONG, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney; MICHAEL NEVILLE, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney; COUNTY OF WASHOE, a political subdivision of the State of Nevada,
Defendants-Appellees.

HERB HALLMAN CHEVROLET, INC., a Nevada corporation; JOHN STANKO,
Plaintiffs-Appellants,

No. 97-16976

v.

D.C. No. CV-94-00333-DWH

DOROTHY NASH-HOLMES; DONALD COPPA; KARL HALL; FRANK LANDES; JOHN J. LONG; MICHAEL NEVILLE; WASHOE COUNTY,
Defendants-Appellees.

Appeals from the United States District Court
for the District of Nevada
David Warner Hagen, District Judge, Presiding

Argued and Submitted
January 12, 1999--San Francisco, California

Filed March 3, 1999

Before: Joseph T. Sneed, A. Wallace Tashima, and Barry G. Silverman, Circuit Judges.

Opinion by Judge Sneed

COUNSEL

Nathan Z. Dershowitz, Dershowitz & Eiger, New York, New York, for the plaintiffs-appellants.

Larry R. Hicks, McDonald Carano Wilson McCune Bergin Frankovich & Hicks, Reno, Nevada; Melanie Foster, Washoe County District Attorney, Reno, Nevada, for the defendants-appellees.

OPINION

SNEED, Circuit Judge:

Herb Hallman Chevrolet, Inc.--a Reno automobile dealership--its owner, John Stanko ("Stanko"), and employees (collectively "Hallman Chevrolet") appeal from a grant of summary judgment by Judge David Warner Hagen of the United States District Court for the District of Nevada, in a consolidated 42 U.S.C. § 1983 civil rights action alleging prosecutorial misconduct by Washoe County, three county prosecutors and three county investigators (collectively "Washoe prosecutors"). On appeal, Hallman Chevrolet argues that the Washoe prosecutors are not entitled to immunity from suit for deliberately omitting facts and making false statements in support of two search warrants and impaneling a Washoe County grand jury without probable cause. Hallman Chevrolet attributes these constitutional violations to the individual defendants and to Washoe County because, they contend, the Washoe prosecutors were acting pursuant to

Washoe County policy. Finally, Hallman Chevrolet argues that the district court erred in awarding defamation-related attorneys' fees to the Washoe prosecutors.

We affirm the district court's ruling against Hallman Chevrolet on the merits, but reverse its award of attorneys' fees.

I.

BACKGROUND

In late December 1990, Rick Wells complained to the Reno Police Department that Hallman Chevrolet appropriated his $600 factory rebate, due on a new car purchase, by forging his signature on a rebate assignment form. Wells recounted his dealings with Hallman Chevrolet to police in a written statement, which follows in part:

> On 10-14-90, I signed the Lease Agreement and took possession of the van. I was told on [10-13-90 or 10-14-90] or both of these dates that rebates were not being offered. . . . Later, I questioned [salesman] Ron Hall again as to rebate offerings and was told that there were none. I was told by Ron Hall and J.J. that I could purchase the van for $500 over cost regardless of the method of financing. I gave them a mercantile check in the amount of $4,000 to be held until 11-11-90 . . . . I was told by J.J. and Ron Hall that leasing would save me $80 to $100 per month . . . . On 11-2-90, I went . . . to my credit union . . . [and] spoke with a loan officer who quoted a much lower rate than the lease. . . . On [ ] 11-6-90 . . . my loan application [was] approved.

I then contacted [Hallman] Chevrolet . . . and notified [them] that I had decided to purchase the vehicle for the $500 over invoice that we had agreed to . . . . I received a call back from Dan with a very hostile tone saying . . . . I had signed a [lease] contract and would be held to it. When I questioned him as to why I could not purchase as per our original agreement at $500 over invoice, he turned the phone over to Ron Hall who said he was going to lose a bonus check if I bought the vehicle and that I should "just bring the rig back". I was also threatened with legal action. Due to the hostile and abusive tone of our conversation, I . . . [stopped] payment on the down payment check . . . on 11-6-90. . . . On 11-9-90, I telephoned John Stenko [sic], one of the owners who said he had sent me a certified letter . . . . which he [read over the phone]. . . . [H]e offered a price of $20,212, which I accepted over the phone. . . . I then went to the [dealership] to get a receipt and noticed rebate list memo taped to the podium. . . . I decided first to get verification direct from Chevrolet . . . .

Then on 12-23-90, I went to the dealership. Ron Hall was in the lot and I asked him what had happened to my $600 rebate. He said rebates weren't being offered on my vehicle, at which time I told him he was lying, that I had a letter [dated 12-11-90] from Chevrolet to prove it and they had stolen my money.

. . . [General Sales Manager] Mr. Souza said I had signed over the rebate and I told him I wanted to see the paper. He got my file and showed me . . . . I advised him that the signature

was a forgery and that unless he wished to got to court, I wanted my money. He refused to offer the rebate and I advised both he and Ron Hall that I was going to pursue this and that somebody was going to jail.

On May 8, 1991, Wells underwent a polygraph examination at the Reno Police Department and the examiner concluded that Wells was speaking truthfully. On July 2, 1991, the county handwriting analyst determined that the signature in question "exhibits the characteristics of a`simulated forgery.'" On July 19, 1991, police forwarded their report to the Washoe County District Attorney's Office where it was assigned to Assistant District Attorney Karl Hall ("A.D.A. Hall").

On November 27, 1991, District Attorney investigators ("D.A. investigators") confronted owner Stanko. In response to the D.A. investigators' accusation that Hallman Chevrolet forged Wells' signature on the rebate form, Stanko stated that Wells had authorized the dealership to reproduce his signature. In support of his claim, Stanko voluntarily produced two power of attorney forms purportedly signed by Wells and a list of rebates ("Rebate Recap Sheet") credited to the dealership. The D.A. investigators submitted the power of attorney forms to the county handwriting analyst who concluded that there was "no basis for identifying [Wells] as the writer." Investigators discovered that the forms, even if signed by Wells, did not authorize the dealership to reproduce his signature on other documents. Investigators returned to the dealership to question Stanko regarding the discrepancies, whereupon he angrily refused to cooperate.

D.A. investigators began to contact other customers listed on the Rebate Recap Sheet, including Daniel and Donna Pease (the "Peases"). The dealership received a $500 rebate from Chevrolet for the Peases' transaction, but the Peases apparently did not receive credit for the rebate. Although Daniel Pease confirmed

that it was his signature on the rebate assignment form, neither he nor his wife remembered salesman Hall mentioning a rebate.

At this point, D.A. investigators decided to seek a search warrant because they believed they had probable cause to suspect Hallman Chevrolet of criminal conduct. A.D.A. Hall drafted an application for the search warrant which a magistrate issued on January 23, 1992. Four days later, D.A. investigators executed the warrant and seized 151 transaction files.

In the week following the execution of the warrant, one current and two former Hallman Chevrolet employees voluntarily came forward to confirm dealership policies encouraging salesmen to engage in fraudulent and unfair business practices. They stated that it was dealership policy not to tell customers about rebates and to get them unknowingly to assign their rebates to the dealership.

D.A. investigators began to examine the sales files obtained in the first search. They contacted dozens more customers and learned that, in many cases, the dealership retained down-payments, trade-ins, and rebates without ever applying the credit to customers' leases to reduce their capitalized costs. They also discovered that the dealership had charged customers for extended warranties they specifically refused or never received. From February until mid-March 1992, D.A. investigators identified seventeen of the most clear and convincing instances of fraud and conducted taped interviews with those customers.

Washoe prosecutors obtained a second search warrant which they executed on March 27, 1992. With this warrant, they seized 1,700 transaction files. After reviewing the files and interviewing dozens of customers, investigators again selected the transactions containing the most convincing evidence of fraud and conducted taped interviews with those 35 customers.

The D.A. investigators also continued to interview former dealership employees. In April 1992, former employee William Dallman stated that he had observed salesmen forging names on rebate assignment documents and that it was common practice to add the cost of an extended warranty to the purchase price without informing the customer. He also described how the dealership falsified customer credit applications in order to obtain approval from banks for customer loans. Another former employee, Bobby Atkerson, stated that he once overheard three salesmen discussing the forgery of a customer's signature. When the discussion ended, Atkerson entered the room and observed a piece of paper with sixteen versions of customer Rick Wells' signature. Additionally, he confirmed that salesmen added warranties without customer consent and were instructed not to mention rebates.

Based on this and other evidence, Assistant District Attorney Donald Coppa ("A.D.A. Coppa") impaneled a Washoe County grand jury on July 8, 1992. Before presenting the evidence, A.D.A. Coppa told the grand jury that they were investigating the "business practices" of Hallman Chevrolet and its employees. In twenty sessions over the next year, the grand jury heard personal sworn testimony from seventy-seven witnesses--nearly all of whom had been interviewed prior to the proceedings--and received over 3,200 pages of documents and transcripts. On July 2, 1993, the grand jury returned an eighty-one count indictment, the largest in the history of the county, charging seventeen Hallman Chevrolet employees with 409 felony offenses. Trial was set for May 4, 1994. Just before trial, however, Deputy District Attorney Gary Hatlestad ("D.D.A. Hatlestad") voluntarily dismissed most of the charges because, according to him, A.D.A. Coppa had made a fundamental pleading error in the indictment by treating accessory suspects as principals. In a lengthy decision, Nevada state court Judge Whitehead dismissed the remaining charges with prejudice based on what he found to be egregious prosecutorial misconduct.

The Washoe prosecutors appealed the decision to the Nevada Supreme Court, but the newly elected D.A. dismissed that appeal before it was heard. Following the dismissal, Hallman Chevrolet filed this civil rights action in the United States District Court for the District of Nevada. The district court granted the Washoe prosecutors' motion for summary judgment and awarded them fees for the defamation-plus litigation. Hallman Chevrolet now appeals. We affirm the district court's grant of summary judgment, but reverse its award of fees.

II.

STANDARDS OF REVIEW

We review de novo the district court's grant of summary judgment, *see Hervey v. Estes*, 65 F.3d 784, 788 (9th Cir. 1995), and resolve all factual disputes in favor of Hallman Chevrolet, *see Knox v. Southwest Airlines*, 124 F.3d 1103, 1107 (9th Cir. 1997). This Court also reviews de novo the district court's decision to afford public officials qualified or absolute immunity. *See Hervey*, 65 F.3d at 788. We review for abuse of discretion the district court's award of attorneys' fees to the Washoe prosecutors. *See Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S. Ct. 1933, 1941, 76 L. Ed. 2d 40 (1983); *Oviatt v. Pearce*, 954 F.2d 1470, 1481 (9th Cir. 1992).

III.

DISCUSSION

A. *Investigative Immunity*

[1] Hallman Chevrolet first contends that the Washoe prosecutors are not immune from suit for their investigative activities. We disagree. A prosecutor may only shield his investigative work with qualified immunity. *See Buckley v.*

Fitzsimmons, 509 U.S. 259, 273, 113 S. Ct. 2606, 2615, 125 L. Ed. 2d 209 (1993). The qualified immunity question turns on the "objective legal reasonableness" of the action. *Lombardi v. City of El Cajon*, 117 F.3d 1117, 1125 n.5 (9th Cir. 1997) (citing *Anderson v. Creighton*, 483 U.S. 635, 638-39, 107 S. Ct. 3034, 3038, 97 L. Ed. 2d 523 (1987)). It is not objectively reasonable for a prosecutor deliberately or recklessly to misstate or omit facts material to the existence of probable cause. *See id.* at 1126.

[2] Hallman Chevrolet asserts that the Washoe prosecutors misrepresented material facts in affidavits supporting two search warrant applications.[1] Hallman Chevrolet claims that customer Wells received credit for his rebate and that the Washoe prosecutors misrepresented that fact. The record, however, suggests otherwise. More importantly, the Washoe prosecutors were reasonable to believe otherwise. During his polygraph examination, Wells made a sworn statement, which the polygraph analyst found to be truthful, that he never received his rebate. Moreover, the county handwriting analyst determined that Wells' signature was a probable forgery. The Washoe prosecutors were also aware that owner Stanko and several Hallman Chevrolet employees had given different versions of the events to Wells, the police and D.A. investigators. Furthermore, despite numerous opportunities, Hallman Chevrolet failed to produce any documentary evidence or reliable testimony refuting Wells' version of the events. Hallman Chevrolet next argues that the Washoe prosecutors deliberately misled the magistrate by calling the signatures in question "confirmed" forgeries. We disagree. These signatures clearly exhibit the signs of forgery. According to the Washoe County handwriting expert, they

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[1] An affiant, Reno Police Detective Robert McDonald, was not a named defendant, but according to Hallman Chevrolet, the affidavit itself was drafted by A.D.A. Hall. For purposes of summary judgment, that assertion is assumed true.

differed from Wells' known writing style and there was "no basis for identifying [Wells] as the writer."

[3] Hallman Chevrolet also asserts that the Washoe prosecutors deliberately omitted material facts in their affidavits. To show that an omission is material, "[t]he plaintiff must establish that the remaining information in the affidavit is insufficient to establish probable cause." *Hervey*, 65 F.3d at 789. The standard for determining probable cause under Nevada law is whether there is "slight, even marginal, evidence" to support the charge. *State v. Boueri*, 672 P.2d 33, 36 (Nev. 1983).

[4] Although the Washoe prosecutors did omit facts from their affidavits, none of these facts was material. For example, Washoe prosecutors omitted the fact that the Department of Motor Vehicles ("DMV") had made an inquiry and determined that Hallman Chevrolet did not owe any rebate money to Wells. This fact was, however, immaterial because the DMV investigator made his determination without knowing of the alleged forgery. The DMV investigator later acknowledged that he would have reopened the Wells investigation had he known of the forgery. In addition, Washoe prosecutors neglected to state that Hallman Chevrolet voluntarily turned over Wells' file and that an investigation of twelve other customers revealed only that one couple did not recall being told of their rebate. When viewed in context, however, these facts do not suggest Hallman Chevrolet's innocence. Despite Hallman Chevrolet's initial cooperation, owner Stanko quickly refused voluntarily to produce documents or otherwise assist authorities in the investigation. Moreover, the same salesman who apparently defrauded Wells was also involved in the other suspect transaction.

[5] Washoe prosecutors did not disclose to the magistrate that Wells had been convicted earlier of bank fraud involving a vehicle loan and had a possible motive to allege fraud.

These facts might bear on Wells' credibility. However, the Washoe prosecutors corroborated Wells' story by administering a polygraph examination, submitting documents to a handwriting specialist, and taking the sworn statement of another customer who had a similar experience with the same salesman. Thus, a neutral and detached magistrate would have found probable cause even if the Washoe prosecutors had included these unfavorable facts.

In sum, the Washoe prosecutors did not intentionally omit or misrepresent any facts–that were material to the finding of probable cause. Nor did they act otherwise to destroy their investigative immunity.

B. *Prosecutorial Immunity*

Hallman Chevrolet next contends that the Washoe prosecutors are not entitled to the protection of absolute immunity for their activities after the initiation of grand jury proceedings because they functioned as investigators rather than advocates. We reject this contention.

[6] A prosecutor performing an advocate's role is an officer of the court entitled to absolute immunity. *See Buckley*, 509 U.S. at 273, 113 S. Ct. at 2615, 125 L. Ed. 2d 209. A prosecutor's acts in the course of his role as an advocate "include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Id.* The Supreme Court has recognized that "prosecutors are absolutely immune from liability under § 1983 for their conduct before grand juries. " *Burns v. Reed*, 500 U.S. 478, 490 n.6, 111 S. Ct. 1934, 1941 n.6, 114 L. Ed. 2d 547 (1991).

[7] The Washoe prosecutors functioned as advocates in the grand jury proceedings. By the time the grand jury was impaneled, the

Washoe prosecutors had completed a vast majority of the investigation and, prior to the impanelment, virtually every witness had been interviewed and every exhibit compiled. After A.D.A. Coppa impaneled the grand jury, he sought an indictment primarily by presenting to the grand jury the witnesses he had already interviewed and the evidence he had previously gathered.

[8] Nonetheless, Hallman Chevrolet insists that the Washoe prosecutors are not entitled to the protection of absolute immunity because they lacked probable cause to impanel the grand jury. Under federal law, "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Buckley*, 509 U.S. at 274, 113 S. Ct. at 2616, 125 L. Ed. 2d 209. The degree of strength required to establish probable cause is determined by state law. *Berg v. Leason*, 32 F.3d 422, 425 (9th Cir. 1994).

[9] The Nevada standard for determining probable cause is whether there is "slight, even marginal, evidence " to support the charge. *Boueri*, 672 P.2d at 36. "The state need only present enough evidence to create a reasonable inference that the accused committed the offense with which he or she is charged." *Id.; accord LaPena v. Sheriff*, 541 P.2d 907 (Nev. 1975). In *Boueri*, the defendant was accused of embezzling money from his employer, Caesar's Palace, where he worked as vice-president in charge of hosting affluent guests. 672 P.2d at 36. As part of his duty to induce such persons to visit Caesar's, defendant would arrange complimentary air fare in the name of guests through a local travel agency. See id. According to Caesar's policy, when defendant sought refunds from the travel agency for unused tickets, checks were to be made out directly to Caesar's. *See id.* Caesar's policy did not authorize defendant to receive cash refunds for unused tickets. *See id.* At the grand jury hearing, however, the travel agent stated that the agency usually issued checks to the order of cash and delivered them to defendant. *See id.* Yet, neither Caesar's nor its guests ever received the money.

See id. The court's "logical inference" from these facts was sufficient to establish probable cause that defendant had embezzled the money. *See id.*

[10] In the present case, the Washoe prosecutors had probable cause exceeding that recognized in *Boueri*. After a year-long investigation, the Washoe prosecutors had compiled hundreds of supporting documents and interviewed dozens of witnesses, including former employees and customers. As a result of this investigation, the Washoe prosecutors had ample and convincing evidence that Hallman Chevrolet employees had forged customers' signatures, withheld rebates, retained customer down-payments intended to reduce principal balances and made material misrepresentations to customers.

Nonetheless, Hallman Chevrolet contends that probable cause did not exist at the time the grand jury was impaneled. First, it argues that D.D.A. Hatlestad admitted that "there was not even `slight or marginal evidence' " to support any of the charges and that admission is controlling. Second, it argues that the Nevada state court ruling that Washoe prosecutors did not have probable cause is controlling. We reject both arguments.

First, D.D.A. Hatlestad did not admit that the Washoe prosecutors acted without "slight or marginal evidence." He actually stated that "the counts were not, *as pleaded*,[2] supported by slight or marginal evidence . . . . [But] an arresting officer, acting either with or without an arrest warrant, would have had *probable cause to believe that each of the named defendants had committed crimes* under Nevada law and could have arrested them accordingly" (emphasis added). Contrary to Hallman

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[2] According to the Washoe prosecutors, A.D.A. Coppa made a fundamental pleading error in drafting the indictment by failing to identify conduct which would cause an accessory to be responsible as a principal.

Chevrolet's position, D.D.A. Hatlestad's statement actually affirms the existence of probable cause. Nonetheless, we are not bound by his characterization of the facts.

Second, we are not precluded by the Nevada state court ruling on the question of whether there was probable cause because the Nevada state court did not reach this issue. It was neither "actually litigated" nor "necessarily decided" in the state court. Under Nevada law, collateral estoppel applies when an issue is "actually litigated" and "necessarily determined" in a prior proceeding, and the parties in the two proceedings are the same or in privity. *See Marine Midland Bank v. Monroe*, 756 P.2d 1193, 1194 (Nev. 1988). Thus, we reject Hallman Chevrolet's preclusion argument.

C. *Alleged Unconstitutional County Policy*

Hallman Chevrolet next claims that A.D.A. Coppa's actions served as a cognizable basis for the imposition of liability against Washoe County because he exercised policy-making authority in violation of Hallman Chevrolet's constitutional rights.

[11] "[M]unicipal liability under § 1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembauer v. City of Cincinnati*, 475 U.S. 469, 483-84, 106 S. Ct. 1292, 1300, 89 L. Ed. 2d 452 (1985). "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 477, 106 S. Ct. at 1297, 89 L. Ed. 2d 452 (quoting *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed. 2d 611 (1978)).

[12] The Washoe prosecutors, including A.D.A. Coppa, performed their duties in good faith--properly establishing probable cause in seeking both search warrants, convening the grand jury and making arrests. In light of the fact that the Washoe prosecutors did not violate Hallman Chevrolet's constitutional rights, we need not address the question of whether A.D.A. Coppa was a policymaker for the purpose of attributing his actions to Washoe County.

D. *Attorneys' Fees for Defamation-plus Claim*

[13] Hallman Chevrolet also claims that the district court erred in awarding attorneys' fees to the Washoe prosecutors for the so-called "defamation-plus"[3] claim. We agree. District courts are authorized to award attorneys' fees to a prevailing defendant in civil rights cases only in those exceptional cases when the action is unreasonable, frivolous, meritless, or without foundation, or when the plaintiff continues to litigate after it clearly becomes so. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 98 S. Ct. 694, 701, 54 L. Ed. 2d 648 (1978) (interpreting the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988); *see also Franceschi v. Schwartz*, 57 F.3d 828, 832 (9th Cir. 1995).

[14] In this case, Hallman Chevrolet's claim for defamation-plus was not frivolous. There are two ways to state a cognizable § 1983 claim for defamation-plus: (1) allege that the injury to

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[3] A § 1983 action requires that a claimant plead more than mere injury to reputation. The injury to reputation must be joined with an injury to a liberty or property interest protected by the due process clause of the Fourteenth Amendment. *See Paul v. Davis*, 424 U.S. 693, 703, 96 S. Ct. 1155, 1161, 47 L. Ed. 2d 405 (1976); *see also Cooper v. Dupnik*, 924 F.2d 1520, 1532 (9th Cir. 1991) (citation omitted). Hence, the label "defamation-plus."

reputation was *inflicted in connection* with a federally protected right; or (2) allege that the injury to reputation *caused the denial* of a federally protected right. *See Cooper v. Dupnik*, 924 F.2d 1520, 1532 (9th Cir. 1991). Hallman Chevrolet asserted a defamation-plus claim under each of these methods.

1. *Injury in connection with a federally protected right.*

First, Hallman Chevrolet argued that the Washoe prosecutors injured its reputation in connection with the deprivation of its federally protected right to be free from unlawful searches, seizures and arrests. Hallman Chevrolet adequately alleged all of the elements of defamation-plus, including the allegation that the Washoe prosecutors made defamatory comments in connection with indictments and arrests for which there was no probable cause. Even though the district court eventually granted summary judgment on the issue of probable cause, it was reasonable for Hallman Chevrolet to believe that the defamation-plus claim had merit. The claim had survived an earlier motion to dismiss which this Court recognizes as evidence that the claim is not without merit. *See Jensen v. Stangel*, 762 F.2d 815, 818 (9th Cir. 1985).

Moreover, the state court order implied that the facts would support a defamation-plus claim against the Washoe prosecutors. We draw attention to the state court order not to endorse its holding, but instead to demonstrate the reasonableness of Hallman Chevrolet's defamation-plus claim. According to the state court, the Washoe prosecutors disregarded Nevada state law throughout the grand jury process. In an excoriating judgment, Nevada District Judge Jerry Whitehead stated:

> The undersigned has never before witnessed a criminal indictment in a serious case where the procedures that have been established to insure fairness were so disregarded and ignored. The

> Court is shocked that [Hallman Chevrolet has] been subjected to criminal charges, public vilification, and enormous economic loss based upon a proceeding so flawed and unfair. Our system was designed to avoid such abuses of official power, but the system failed [Hallman Chevrolet] in this case.

Nevada v. Bayus, Order, No. CR93-1259 at 4-5 (Nevada 2nd Dist., April 26, 1994). The state court order clearly influenced Hallman Chevrolet. In its opening brief, Hallman Chevrolet quotes a section of the state court order titled "Prejudicial Pre-Trial Publicity By The District Attorney" which states that the District Attorney made comments with the "clear intent" to "improperly influence" the court and the jury. In light of the state court order and the defamation-plus claim's survival of an earlier motion to dismiss, it is reasonable to assume that Hallman Chevrolet genuinely disputed the district court's conclusion and continued to litigate because it felt compelled to preserve the separate defamation-plus issue for appeal.

2. *Injury causing denial of a federally protected right.*

In its second claim for defamation-plus, Hallman Chevrolet contended that the Washoe prosecutors' defamatory statements deprived it of business goodwill, a state property right that is afforded constitutional protection. In holding this claim to be frivolous, the district court stated that "nothing in [Hallman Chevrolet's] papers" makes the showing that business goodwill is a property right protected under Nevada state law and that a "mere injury either to reputation or business goodwill is insufficient to support a defamation-plus § 1983 claim, *unless these are shown under State law to be legally protected interests, rather than merely the basis for tort claims."* (emphasis added).

[15] The district court, however, apparently overlooked the relevant portion of Hallman Chevrolet's papers. In fact, Hallman Chevrolet cited specific cases[4] for the principle that business goodwill is a protected property right in Nevada. Despite the complexity of the law in this area, Hallman Chevrolet made a genuine attempt to assert its claim under the law of Nevada. Moreover, Hallman Chevrolet relied almost entirely on the earlier state court judgment which strongly suggested that the Washoe prosecutors had violated Hallman Chevrolet's constitutional rights. Under these circumstances, we hold that it was error to find the defamation-plus claim unreasonable or frivolous.

[16] For these reasons and in light of the well-established rule that a defendant should only receive an award of attorneys' fees in extreme cases, we hold that the district court abused its discretion in making such an award. Each party shall bear its, his or her own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART.

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[4] In their papers opposing the motion for summary judgment, Hallman Chevrolet cited *Ford v. Ford*, 782 P.2d 1304, 1308 (Nev. 1989) and *Zales-Las Vegas v. Bulova Watch*, 396 P.2d 683, 689 (Nev. 1989).

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DONALD COPPA, individually and in his official capacity as Assistant District Attorney for Washoe County; et al.,
Defendants-Appellees.

JERRY VAN DER HOEVEN; et al.,

No. 97-16960

Plaintiffs-Appellants,

D.C. No. CV-95-00090-DWH

v.

DONALD COPPA, individually and in his official capacity as Assistant

District Attorney for Washoe
County; DOROTHY NASH-HOLMES,
individually and in her official
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ORDER

Before: SNEED, TASHIMA, and SILVERMAN, Circuit Judges

The panel has voted to deny appellants' petition for rehearing and for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Appellants' petition for rehearing and for rehearing en banc is denied.

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DOROTHY NASH-HOLMES; et al.,
Defendants-Appellees.

JERRY VAN DER HOEVEN; et al.,

No. 97-15323

Plaintiffs-Appellants,

D.C. No. CV-95-00090-DWH

v.

DONALD COPPA, individually and in his official capacity as Assistant District Attorney for Washoe County; et al.,
Defendants-Appellees.

JERRY VAN DER HOEVEN; et al.,

No. 97-16960

Plaintiffs-Appellants,

D.C. No. CV-95-00090-DWH

v.

DONALD COPPA, individually and in his official capacity as Assistant

District Attorney for Washoe County; DOROTHY NASH-HOLMES, individually and in her official capacity as District Attorney for Washoe County; et al.,
Defendants-Appellees.

HERB HALLMAN CHEVROLET, INC., a Nevada corporation; JOHN STANKO,
Plaintiffs-Appellants,

No. 97-16976

v.

D.C. No. CV-94-00333-DWH

DOROTHY NASH-HOLMES; et al.,
Defendants-Appellees.

ORDER

Before: SNEED, TASHIMA, and SILVERMAN, Circuit Judges

Appellees' petition for rehearing is denied.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

HERB HALLMAN CHEVROLET, INC., a Nevada corporation, and JOHN P. STANKO, an individual,

Plaintiffs,

vs.

DOROTHY NASH HOLMES, et al.,

Defendants.

_____/

CV-N-94-33-DWH

ORDER

By an amended complaint (#5), plaintiffs--a local automobile dealership ("Champion") and its owner ("Stanko")--sue defendant--prosecutors and investigators from the Washoe County District Attorney's Office ("the D.A. defendants") and Washoe County–for various constitutional violations under 42 U.S.C. § 1983 and various state law torts arising out the criminal investigation and prosecution of plaintiffs by defendants and the Reno Police Department ("RPD"). Before the court are the parties' papers on the issue of absolute immunity (#s 67, 68, 73, 76, 78), on defendant Washoe County's motion for summary judgment (#s 51, 71, 74), and on the D.A. defendants' motion for summary judgment (#s 69, 75, 79). No oral argument was requested, and, due to the extensive briefing, the court finds oral argument unnecessary.

PLAINTIFFS' CLAIMS

In summary, plaintiffs' lengthy amended complaint alleges the following, making scattershot allegations of

constitutional violations throughout: the D.A. defendants, under custom or policy of Washoe County, advised and assisted RPD in illegally obtaining and executing invalid search warrants of Champion in January and March of 1992; they illegally retained property seized during those searches; they illegally had plaintiff Stanko arrested; they illegally employed a grand jury to investigate and indict plaintiffs without probable cause; and, throughout the above events, they defamed plaintiffs to the media and to plaintiffs' customers.

The amended complaint sets forth eight "claims for relief": (1) deprivation of constitutional rights and conspiracy to deprive plaintiffs of constitutional rights in violation of 42 U.S.C. § 1983, seeking damages, fees, and costs; (2) failure to train by Washoe County, resulting in the above violations; (3) declaratory and injunctive relief to remedy the above violations; (4) punitive damages based on the above violations; (5) defamation; (6) conversion; (7) interference with contractual relations; and (8) intentional infliction of emotional distress.

ANALYSIS

I. Absolute Immunity

As described more fully in the court's order entered March 1, 1996 (#65), the procedural posture of this case led the court to order the parties to brief it on the issue of absolute immunity. The D.A. defendants complied with that order (#67), contending, in a nutshell, that the prosecutors are absolutely immune from all of plaintiffs' claims except for defamation and failure to train, and that the investigators are absolutely immune to the same extent from July 8, 1992--the date the grand jury was impanelled–to the present. Washoe County joined that brief (#68). Plaintiffs responded by moving for partial summary judgment in their favor on the issue of absolute immunity (#73). Alternatively, they requested additional discovery pursuant to

Federal Rule of Civil Procedure 56(f) prior to the court's ruling on absolute immunity. Additionally, plaintiffs requested that the court "rule on their Motion for Order Clarifying and Enforcing Order of February 27, 1995 and for Order Compelling Discovery (document number 36)." #73 at 2. Defendants then replied (#76, supplemented by #78), which closed the briefing on this issue.

The court set forth the principles of absolute immunity as applied to prosecutors and investigators in its order of March 1, 1996 (#65), and hereby incorporates that discussion into this order. To that discussion, the court adds that, as the officials seeking absolute immunity, the D.A. defendants bear "the burden of showing that such immunity is justified for the function[s] in question." *Burns v. Reed*, 500 U.S. 478, 486 (1991). Upon review of the parties' respective papers, the court finds that the D.A. defendants have not met their burden with respect to any conduct before taking the case to the grand jury, and have met their burden with respect to some, but not all, conduct thereafter.

The D.A. defendants are not entitled to absolute immunity to the extent they participated in obtaining and executing the search warrants in January and March of 1992. They admit that defendant prosecutor Hall drafted the affidavits signed by Officer MacDonald of the Reno Police Department in support of the first search warrant, and that defendant prosecutor Coppa drafted the affidavit in support of the second search warrant. The D.A.'s office did not decide that it had probable cause to seek an indictment from a grand jury until months later. As the Supreme Court noted in *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993), "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested."

Contrary to defendants' arguments, *Burns* does not hold that absolute immunity is available for a prosecutor's role in drafting affidavits in support of a search warrant. In *Burns*, the

Supreme Court went out of its way to limit the scope of its discussion to the prosecutor's participation in a probable cause hearing before the court. 500 U.S. 487-89. Moreover, it noted that the hearing occurred after arrest, which made it "connected with the initiation and conduct of a prosecution." *Id.* at 492.

Under the functional approach to absolute immunity required by *Buckley*, 509 U.S. at 2615, the D.A. defendants' roles in obtaining and executing the search warrants were analogous to providing legal advice to the police, which *Burns* held does not qualify for absolute immunity. 500 U.S. at 493. In *Malley v. Briggs*, 475 U.S. 335, 342-43 (1986), the Supreme Court held that absolute immunity was not available for a police officer's application for a warrant. The same result obtains here to the prosecutors' role in helping police officers prepare applications for warrants. *See Kohl v. Casson*, 5 F.3d 1141, 1146 (8th Cir. 1993) (prosecutor absolutely immune for appearing with police officer before magistrate in hearing to obtain warrant, but only qualifiedly immune for advising officer on preparing affidavit).

On the other hand, the D.A. defendants have met their burden of showing that absolute immunity is justified for their actions following the initiation of proceedings before the grand jury, which began July 8, 1992. Courts generally have found prosecutors are absolutely immune from liability under § 1983 for their conduct before grand juries. *Burns*, 500 U.S. at 490 n.6. Citing *Buckley*, plaintiffs argue that immunity is inappropriate here, though, because defendant Coppa lacked probable cause when he went before the grand jury and he used the grand jury as an investigative tool.

Plaintiffs' reliance on *Buckley* is misplaced. In *Buckley*, the prosecutors "convened a special grand jury for the sole purpose of investigating" a crime for which they had insufficient evidence to support anyone's arrest. 509 U.S. at 263-64.

> It was well after the alleged fabrication of false evidence concerning the bootprint that a special grand jury was impaneled. And when it finally was convened its immediate purpose was to conduct a more thorough investigation of the crime--not to return and indictment against a suspect whom there was already probable cause to arrest. Buckley was not arrested, in fact, until 10 months after the grand jury had been convened and had finally indicted him.

Id. at 275. In contrast, the D.A. defendants have succeeded in showing they had probable cause when Coppa first went before the grand jury, that thereafter his actions and the actions of the other prosecutors and investigators largely consisted of preparing evidence for presentation to the grand jury, and that the lengthy period before which an indictment was returned mainly was due to the volume of materials and number of charges and defendants. Further, they are entitled to absolute immunity for any subsequent conduct on their part resulting in plaintiff Stanko's arrest because such conduct was in preparation "for the initiation of judicial proceedings" and occurred in the course of their roles as advocates for the state. *Buckley*, 509 U.S. at 273.

In an attempt to contravene the above, plaintiffs' request relief under Rule 56(f), but their request is inadequate. Under that rule,

> Should it appear from the affidavits of a party opposing [a motion for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make

such other order as it just.

Fed. R. Civ. P. 56(f). The Ninth Circuit has summarized the analysis of Rule 56(f) motions as follows:

> The party opposing summary judgment bears the burden of showing "what facts she hopes to discover to raise a material issue of fact." . . . The party seeking additional discovery also bears the burden of showing that the evidence sought exists. Denial of a Rule 56(f) application is proper where it is clear that the evidence sought is almost certainly nonexistent or is the object of pure speculation.

Terrell v. Brewer, 935 F.2d 1015, 1018 (9th Cir. 1991) (citations omitted).

Counsel's affidavit claims, but does not support, that certain "documentation produced shows an ongoing investigation of new witnesses and new facts on or after July 8, 1992." #73 Dickerson Aff. He therefore "believes that there is a more than reasonable likelihood of generating, through additional discovery into facts after July 8, 1992, information which would be helpful on [the] issues of absolute and qualified immunity." *Id.* These averments fail to satisfy the above requirements. Moreover, the affidavits and exhibits submitted with the D.A. defendants' brief and reply brief strongly suggest that "the evidence sought [by plaintiffs] is almost certainly nonexistent or is the object of pure speculation." *Terrell*, 935 F.2d at 1018. *See also Schlesinger v. Central Intelligence Agency*, 591 F. Supp. 60, 64-65 (D.D.C. 1984) (Rule 56(f) application denied where mere allegation of factual dispute specifically rebutted by moving party's affidavit), *cited with approval, Visa Int'l Serv. Ass'n v. Bankcard Holders of America*, 784 F.2d 1472, 1476 (9th Cir. 1986). Additionally, inquiries

plaintiffs wish to pursue with respect to conduct after July 8, 1992, as expressed in their brief, #73 at 39, largely involve Coppa's subjective beliefs about the case when he took it before the grand jury; thus, they have little relevance to the absolute immunity issue.

Accordingly, plaintiffs' Rule 56(f) motion should be denied, as should plaintiffs' request that the court "rule on their Motion for Order Clarifying and Enforcing Order of February 27, 1995 and for Order Compelling Discovery (document number 36)." Plaintiffs' motion for partial summary judgment on the issue of absolute immunity should be granted in part and denied in part. The D.A. defendants, both prosecutors and investigators, are entitled to absolute immunity for their actions following July 8, 1992, with the exception, as they concede, that they are not entitled to absolute immunity for their allegedly defamatory, out-of-court statements concerning plaintiffs. Also, defendants have not adequately addressed plaintiffs' claims that defendants illegally retained property seized from plaintiffs, so defendants have not shown they are entitled to absolute immunity on those claims.

II. Qualified Immunity

The D.A. defendants move for summary judgment (#69) primarily on the grounds of qualified immunity. They contend qualified immunity shields them from liability on plaintiffs' § 1983 claims of individual and conspiratorial deprivations of constitutional rights (plaintiffs' first and fourth claims for relief). However, they do not move for summary judgment on plaintiffs' defamation claim. Plaintiffs oppose, objecting that discovery has not yet been completed and objecting to certain exhibits offered by defendants in support of their motion (#75).[1] Defendants reply

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[1] The court does not rely on defendants' exhibit #37, to which plaintiffs object, #75 at 12, and the court overrules

in support of the motion (#79).

"When a public official asserts qualified immunity from liability, the district court must determine whether, in light of clearly established principles governing the conduct in question, the official objectively could have believed that his conduct was lawful." *Osolinski v. Kane*, ___ F.3d ___, 1996 WL 450361, *2 (9th Cir. Aug. 12, 1996).

Concerning plaintiffs' claims that the D.A. defendants caused material misrepresentations and omissions to be made in the affidavits for search warrants, the law was clearly established that judicial deception may not be employed to obtain a warrant. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). However,

> a plaintiff can only survive summary judgment on a defense claim of qualified immunity if the plaintiff can both establish a substantial showing of a deliberate falsehood or reckless disregard and establish that, without the dishonestly included or omitted information, the magistrate would not have issued the warrant.

Hervey v. Estes, 65 F.3d 784, 789 (9th Cir. 1995). Upon an examination of both defendants' and plaintiffs' numerous exhibits, including those offered by plaintiffs in their papers addressing absolute immunity,[2] the court finds plaintiffs have

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plaintiff's other objections to defendants' exhibits, #75 at 10, 11, because those objections are without merit.

[2] It bears nothing that defendants' exhibit purporting to be the affidavit in support of the first search warrant, #69 Ex. 19, is missing several pages. However, the court has reviewed a complete copy of the affidavit offered by plaintiffs with their brief on absolute immunity. #73 Ex. 18

failed to raise a genuine issue of fact with respect to either of the two prongs identified in *Hervey*.

Likewise, plaintiffs' claim that the warrants were facially invalid because they were "general" warrants is belied by the warrants themselves.[3] Unlike warrants which the Ninth Circuit has found unconstitutionally overbroad, *e.g.*, *United States v. Kow*, 58 F.3d 423, 426-28 (9th Cir. 1995), these warrants describe the type of items to be seized with sufficient particularity, e.g., by limiting documents by time frame or by names of certain Champion employees and specifying a limited number of crimes for which evidence was sought. See #69 Ex. 20; #73 Ex. 22. Although the second warrant contained two fairly broad categories of items to be seized, these were only two of several more specific categories. In short, an "objectively reasonable" officer could have relied on either warrant. *Kow*, 58 F.3d at 428.

As to the remaining claims of constitutional violations before July 8, 1992, the D.A. defendants have demonstrated that reasonable officials objectively could have believed their conduct, to the extent plaintiffs have even shown any conduct by these defendants, was lawful. Excluded from the foregoing, of course, are plaintiffs' claims of defamation plus and illegal retention of seized property, which defendants do not address in their motion.

III. Failure to Train and Municipal Liability

Defendants Holmes and Coppa move for summary judgment (#69) on plaintiffs' claim of § 1983 liability for failure

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[3] Again, defendants submit an incomplete copy of the second search warrant, #69 Ex. 34; however, the court has reviewed a complete copy submitted with plaintiffs' brief on absolute immunity. #73 Ex. 22.

to train. Defendant Washoe County moves for summary judgment on plaintiffs' claim of municipal liability under § 1983 (#51). Plaintiffs oppose (#71), and Washoe County replies (#74). Holmes and Coppa join Washoe County's reply. #79 at 24.

Defendants are liable under § 1983 for failure to train "only where the failure to train amounts to deliberate indifference to the rights of persons with whom [the subordinates] come into contact." *Ting v. United States*, 927 F.2d 1504, 1512 (9th Cir. 1991) (quoting *City of Canton v. Harris*, 489 U.S. 378 (1989)). By affidavits offered with its motion, Washoe County has established that all of the individuals had adequate training. The alleged inadequacies complained of by plaintiffs are insufficient to show that defendants "made a 'deliberate' or conscious' choice not to train" subordinates in areas they knew "would 'likely . . . result in the violation of constitutional rights.'" *Ting*, 927 F.2d at 1512 (quoting *Harris*).

Similarly, plaintiffs fail to support their claim that Washoe County, through Holmes and Coppa, sanctioned or ratified constitutional violations. Plaintiffs have not raised a genuine issue under state law that Assistant District Attorney Coppa was a final policymaking county official with respect to grand jury practice. *See Pembaur v. Cincinnati*, 475 U.S. 469, 482-83 (1986). Nor have they raised a genuine issue that District Attorney Holmes directly participated in any of the alleged constitutional deprivations or that her alleged ratification of any actions by subordinates caused those deprivations.

Thus, plaintiffs have failed to raise a genuine issue with respect to failure to train and municipal liability. Again, however, defendants have not addressed the defamation plus claims and illegal retention of seized property claims. Plaintiffs have alleged that defendants Holmes and Coppa were official policymakers for Washoe County. #5 ¶ XII. Hence, it is possible that Washoe County may be liable for their acts of defamation.

See Pembaur, 475 U.S. at 481. Because the parties have not briefed this issue with respect to defamation plus and retention of seized property, it would be inappropriate to summarily adjudicate the issue.

IV. Conclusion

Regarding plaintiffs' first and fourth claims for relief, defendants have shown that they are entitled to absolute immunity on plaintiffs' § 1983 claims after July 8, 1992, and entitled to qualified immunity on plaintiffs' § 1983 claims before that date, except for plaintiffs' claims of defamation plus and retention of siezed property. Defendants also have shown there is no genuine issue of material fact regarding plaintiffs' second claim for relief--for failure to train and municipal liability--except, again, for the defamation plus and retention of seized property claims. Defendants have asserted, and plaintiffs have not controverted, that plaintiffs' third claim for relief--seeking injunctive and declaratory relief--is moot because all property has been returned to plaintiffs and there is no ongoing criminal proceeding. With regard to the state-law causes of action, the court finds it inappropriate to make a summary adjudication of those claims based on the very limited briefing by the parties.

Accordingly, **IT IS HEREBY ORDERED** that defendant Washoe County's motion for summary judgment (#51) is GRANTED IN PART AND DENIED IN PART consistent with the above order.

IT IS FURTHER ORDERED that the remaining defendants' motions for summary judgment (#s 67 & 69) are GRANTED IN PART AND DENIED IN PART consistent with the above order.

IT IS FURTHER ORDERED that plaintiffs' motion for partial summary judgment (#73) is GRANTED IN PART AND DENIED IN PART consistent with the above order; plaintiffs' Rule 56(f) request (#73) is DENIED; and plaintiffs' request that the court "rule on their Motion for Order Clarifying and Enforcing Order of February 27, 1995 and for Order Compelling Discovery (document number 36)" (#73) is DENIED.

DATED: This 26th day of August, 1996.

/s/
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JERRY VAN DER HOEVEN, et al., CV-N-95-90-DWH

Plaintiffs,

vs. **ORDER**

DONALD COPPA, et al.,

Defendants

_____/

Before the court are the parties' papers on the following matters: the City defendants' motion for entry of judgment (#36, 39, 41); the issue of absolute immunity (#s 42, 47, 51, 52); Washoe County's motion for summary judgment (#s 43, 44, 48); and the D.A. defendants' motion for summary judgment (#s 43A, 50, 53). No oral argument was requested, and, due to the extensive briefing, the court finds oral argument unnecessary.

BACKGROUND

In an order entered February 26, 1996 (#33), the court dismissed some of plaintiffs' claims on statute of limitations grounds. The court hereby incorporates the description of plaintiffs' factual allegations and claims from that order into this one. In that order, the court held that any claims which accrued before February 10, 1993, were barred. Specifically, plaintiffs' claims of illegal search and seizure and defamatory press releases connected with the searches in January and March of 1992 were barred. Not necessarily barred from the face of the complaint were claims of alleged defamation to business relations and wrongful retention of property. Finally, not barred were federal

claims of illegal arrest and prosecution and related defamation, as well as state claims of malicious prosecution, abuse of process, false arrest, and false imprisonment.

ANALYSIS

I. Absolute Immunity--D.A. Defendants

As described more fully in the court's order entered March 6, 1996 (#35), the procedural posture of this case led the court to order the parties to brief it on the issue of absolute immunity. The D.A. defendants complied with that order (#42), contending, in a nutshell, that the prosecutors are absolutely immune from all of plaintiffs' claims except for defamation and failure to train, and that the investigators are absolutely immune to the same extent from July 8, 1992--the date the grand jury was impanelled--to the present. Plaintiffs responded by moving for partial summary judgment in their favor on the issue of absolute immunity (#47). Alternatively, they requested additional discovery pursuant to Federal Rule of Civil Procedure 56(f) prior to the court's ruling on absolute immunity. Additionally, plaintiffs requested that the court "rule on their Motion for Order Clarifying and Enforcing Order of February 27, 1995 and for Order Compelling Discovery (document number 36)." #47 at 2. This request refers to a motion (#36) in the related case CV-N-94-33-DWH. Defendants then replied (#51, supplemented by #52), which closed the briefing on this issue.

The court set forth the principles of absolute immunity as applied to prosecutors and investigators in its order of March 6, 1996 (#35), and hereby incorporates that discussion into this order. To that discussion, the court adds that, as the officials seeking absolute immunity, the D.A. defendants bear "the burden of showing that such immunity is justified for the function[s] in question." *Burns v. Reed*, 500 U.S. 478, 486 (1991). Upon review of the parties' respective papers, the court finds that the

D.A. defendants have met their burden of showing that absolute immunity is justified for their actions following the initiation of proceedings before the grand jury, which began July 8, 1992.[1]

Courts generally have found prosecutors are absolutely immune from liability under § 1983 for their conduct before grand juries. *Burns*, 500 U.S. at 490 n.6. Citing *Buckley*, plaintiffs argue that immunity is inappropriate here, though, because defendant Coppa lacked probable cause when he went before the grand jury and he used the grand jury as an investigative tool.

Plaintiffs' reliance on *Buckley* is misplaced. In *Buckley*, the prosecutors "convened a special grand jury for the sole purpose of investigating" a crime for which they had insufficient evidence to support anyone's arrest. 509 U.S. at 263-64.

> It was well after the alleged fabrication of false evidence concerning the bootprint that a special grand jury was impaneled. And when it finally was convened, its immediate purpose was to conduct a more thorough investigation of the crime--not to return an indictment against a suspect whom there was already probable cause to arest. Buckley was not arrested, in fact, until 10 months after the grand jury had been convened and had finally indicted him.

Id. at 275. In contrast, the D.A. defendants have succeeded in showing they had probable cause when Coppa first went before the grand jury, that thereafter his actions and the actions of the other prosecutors and investigators largely consisted of preparing

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[1] As stated above, plaintiff's claims based on conduct before that time have been ruled barred by the statute of limitations.

evidence for presentation to the grand jury, and that the lengthy period before which an indictment was returned mainly was due to the volume of materials and number of charges and defendants. Further, they are entitled to absolute immunity for any subsequent conduct on their part resulting in plaintiffs' arrests because such conduct was in preparation "for the initiation of judicial proceedings" and occurred in the course of their roles as advocates for the state. *Buckley*, 509 U.S. at 273.

In an attempt to contravene the above, plaintiffs' request relief under Rule 56(f), but their request is inadequate. Under that rule,

> Should it appear from the affidavits of a party opposing [a motion for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f). The Ninth Circuit has summarized the analysis of Rule 56(f) motions as follows:

> The party opposing summary judgment bears the burden of showing "what facts she hopes to discover to raise a material issue of fact." . . . The party seeking additional discovery also bears the burden of showing that the evidence sought exists. Denial of a Rule 56(f) application is proper where it is clear that the evidence sought is almost certainly nonexistent or is the object of pure speculation.

Terrell v. Brewer, 935 F.2d 1015, 1018 (9th Cir. 1991) (citations omitted).

Counsel's affidavit claims, but does not support, that certain "documentation produced shows an ongoing investigation of new witnesses and new facts on or after July 8, 1992." #47 Dickerson Aff. He therefore "believes that there is a more than reasonable likelihood of generating, through additional discovery into facts after July 8, 1992, information which would be helpful on [the] issues of absolute and qualified immunity." *Id.* These averments fail to satisfy the above requirements. Moreover, the affidavits and exhibits submitted with the D.A defendants' brief and reply brief strongly suggest that "the evidence sought [by plaintiffs] is almost certainly nonexistent or is the object of pure speculation." *Terrell*, 935 F.2d at 1018. *See also Schlesinger v. Central Intelligence Agency*, 591 F. Supp. 60, 64-65 (D.D.C. 1984) (Rule 56(f) application denied where mere allegation of factual dispute specifically rebutted by moving party's affidavit), *cited with approval*, *Visa Int'l Serv. Ass'n v. Bankcard Holders of America*, 784 F.2d 1472, 1476 (9th Cir. 1986). Additionally, inquiries plaintiffs wish to pursue with respect to conduct after July 8, 1992, as expressed in their brief, # 47 at 39, largely involve Coppa's subjective beliefs about the case when he took it before the grand jury; thus, they have little relevance to the absolute immunity issue.

Accordingly, plaintiffs' Rule 56(f) motion should be denied, as should plaintiffs' request that the court "rule on their Motion for Order Clarifying and Enforcing Order of February 27, 1995 and for Order Compelling Discovery (document number 36)." Plaintiffs' motion for partial summary judgment on the issue of absolute immunity should be granted in part and denied in part. The D.A. defendants, both prosecutors and investigators, are entitled to absolute immunity for their actions following July 8, 1992, with the exception, as they concede, that

they are not entitled to absolute immunity for their defamatory, out-of-court statements concerning plaintiffs. Also, defendants have not adequately addressed plaintiffs' claims that defendants illegally retained property seized from plaintiffs, so defendants have not shown they are entitled to absolute immunity on those claims.

II. Qualified Immunity--D.A. Defendants

The D.A. defendants move for summary judgment (#43A) primarily on the grounds of qualified immunity. They contend qualified immunity shields them from liability on plaintiffs' § 1983 claims of individual and conspiratorial deprivations of constitutional rights (plaintiffs' first and third claims for relief). Due to the above disposition of the absolute immunity issue, it is unnecessary for the court to consider qualified immunity for the claims that survived the statute of limitations dismissal. Again, however, defendants' do not address plaintiffs' claims of defamation plus and illegal retention of seized property, so they have not shown an entitlement to immunity on those claims.

III. Failure to Train and Municipal Liability

Defendants Holmes and Coppa move for summary judgment (#43A) on plaintiffs' claim of § 1983 liability for failure to train. Defendant Washoe County moves for summary judgment on plaintiffs' claim of municipal liability under § 1983 (#43). Plaintiffs oppose (#44), and Washoe County replies (#48). Holmes and Coppa join Washoe County's reply. #53 at 8.

Defendants are liable under § 1983 for failure to train "only where the failure to train amounts to deliberate indifference to the rights of persons with whom [the subordinates] come into contact." *Ting v. United States*, 927 F.2d 1504, 1512 (9th Cir. 1991) (quoting *City of Canton v. Harris*,

489 U.S. 378 (1989)). By affidavits offered with its motion, Washoe County has established that all of the individuals had adequate training. The alleged inadequacies complained of by plaintiffs are insufficient to show that defendants "made a 'deliberate' or conscious' choice not to train" subordinates in areas they knew "would 'likely. . . . result in the violation of constitutional rights.'" *Ting*, 927 F.2d at 1512 (quoting *Harris*).

Similarly, plaintiffs fail to support their claim that Washoe County, through Holmes and Coppa, sanctioned or ratified constitutional violations. Plaintiffs have not raised a genuine issue under state law that Assistant District Attorney Coppa was a final policymaking county official with respect to grand jury practice. *See Pembaur v. Cincinnati*, 475 U.S. 469, 482-83 (1986). Nor have they raised a genuine issue that District Attorney Holmes directly participated in any of the alleged constitutional deprivations or that her alleged ratification of any actions by subordinates caused those deprivations.

Thus, plaintiffs have failed to raise a genuine issue with respect to failure to train and municipal liability. Again, however, defendants have not addressed the defamation plus claims or the claim that defendants illegally retained seized property. Plaintiffs have alleged that defendants Holmes and Coppa were official policymakers for Washoe County. #1 ¶ X. Hence, it is possible that Washoe County may be liable for their acts of defamation. *See Pembaur*, 475 U.S. at 481. Because the parties have not briefed this issue with respect to defamation plus or retention of seized property, it would be inappropriate to summarily adjudicate the issue.

IV. City Defendants' Motion for Entry of Judgment

The City defendants move for entry of judgment in their favor pursuant to Federal Rule of Civil Procedure 54(b) (#36). They contend the court's order entered February 26, 1996,

effectively disposed of all of plaintiffs' claims against them and that "all parties would benefit from the formal entry of judgment . . . ." #36 at 3. Plaintiffs oppose, contending that theories of joint activity and conspiracy, as well as the possibility that future discovery "may uncover facts supporting additional claims for relief against the City defendants . . . ," #39 at 4, make entry of judgment inappropriate. The City defendants' reply (#48) closes the briefing on the motion.

For reasons other than those offered by plaintiffs, the court agrees that it would be inappropriate to direct the entry of final judgment in favor of the City defendants. Under rule 54(b),

> [w]hen more than one claim for relief is presented in any action, . . . or when multiple parties are involved, the court may direct entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay . . . .

Fed. R. Civ. P. 54(b). A decision is final and therefore appealable "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment'" as to that party or claim. *Arizona State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038, 1039 (9th Cir. 1991) (citation omitted). The court's dismissal of certain claims based on the statute of limitations did not necessarily end the litigation as to the City defendants. By the order entered February 26, 1996, the court did not adjudicate plaintiffs' possible § 1983 claims that accrued after February 10, 1993, against these or any defendants. Moreover, although the court noted that plaintiffs state-law claims "lie, if at all, against only the D.A. defendants and perhaps the County," #33 at 8, that statement was not a holding dismissing those claims against the City defendants because the statute of limitations was the only issue properly before the court. In short, the City defendants have

not challenged any claims not barred by the statute of limitations; hence, they are not entitled to judgment on such claims.

Further, the complexity and confusing nature of plaintiffs' complaint counsels against a Rule 54(b) order. Rule 54(b) certification is proper "if it will aid expeditious decision of the case" and "prevent piecemeal appeals." *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1484 (9th Cir. 1993) (citation omitted). Here, the claims against the City defendants are not easily severable from the claims against the other defendants, and, at this stage of the litigation, the possibility of piecemeal appeals appears great.

Accordingly, the motion for entry of judgment will be denied.

V. Conclusion

Regarding plaintiffs' first and third claims for relief, the D.A. defendants have shown that they are entitled to absolute immunity on plaintiffs' § 1983 claims after July 8, 1992, except for plaintiffs' claims of defamation plus and retention of seized property. Defendants also have shown there is no genuine issue of material fact regarding plaintiffs' second claim for relief--for failure to train and municipal liability--except, again, for the defamation plus and retention of seized property claims. With regard to the state-law causes of action, the court finds it inappropriate to make a summary adjudication of those claims based on the very limited briefing by the parties. Finally, the City defendants have not shown they are entitled to entry of judgment under Rule 54(b).

Accordingly, **IT IS HEREBY ORDERED** that defendant Washoe County's motion for summary judgment (#43) is GRANTED IN PART AND DENIED IN PART

consistent with the above order.

IT IS FURTHER ORDERED that the D.A. defendants' motions for summary judgment (#s 43 & 43A) are GRANTED IN PART AND DENIED IN PART consistent with the above order.

IT IS FURTHER ORDERED that plaintiffs' motion for partial summary judgment (#47) is GRANTED IN PART AND DENIED IN PART consistent with the above order; plaintiffs' Rule 56(f) request (#47) is DENIED; and plaintiffs' request that the court "rule on their Motion for Order Clarifying and Enforcing Order of February 27, 1995 and for Order Compelling Discovery (document number 36)" (#47) is DENIED.

IT IS FURTHER ORDERED that the City defendants' motion for entry of judgment (#36) is DENIED.,

DATED: This 26th day of August, 1996.

/s/
UNITED STATES DISTRICT JUDGE